No. 87-1102



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES L. SCHLEIGH, ET AL.,
*Petitioners,*

v.

ESTHER V. REIGH, ET AL.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY ARGUMENT

### RESPONDENTS' ARGUMENT IS INCORRECT: THE "PREVAILING PARTY" STANDARD APPLIED BY THE FOURTH CIRCUIT IS IN SHARP CONFLICT WITH THE STANDARD APPLIED IN THE MAJORITY OF FEDERAL CIRCUITS.

Respondents' principal argument is that there is no conflict among the circuits as to the "prevailing party" standard under the Civil Rights Attorney's Fees Act, 42 U.S.C.

§1988. See Brief in Opp. at 4-8. Specifically, respondents claim that "[t]he Fourth Circuit has aligned itself with the 'catalyst' theory adopted by the First Circuit in Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978)." (Brief in Opp. at 4) (footnote omitted).

Respondents' argument ignores the lengthy memorandum of Chief Justice Rehnquist, joined by Justice O'Connor, dissenting from the denial of certiorari in Long v. Bonnes, 455 U.S. 961 (1982)(noting that the prevailing party standard applied in the Fourth Circuit is in conflict with the First Circuit standard in Nadeau).[1] Further, respondents' argument is flatly refuted by

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[1] That dissent, which post-dates the Fourth Circuit's decision in Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), refutes respondents' claim that the Fourth Circuit is now in harmony with the First Circuit because "[t]he Fourth Circuit applies the Smith test, a revision of the Bonnes test." (Brief in Opp. at 4).

the clear holding of Young v. Kenley, 614 F.2d 373 (4th Cir. 1979), where the Fourth Circuit reversed the district court's denial of attorney's fees based upon Nadeau and remanded for reconsideration in light of Bonnes, and is also refuted by recent district court decisions within the Fourth Circuit. See ECOS, Inc. v. Brinegar, 671 F.Supp. 381, 390 n.3 (M.D.N.C. 1987) ("Other circuits approach this [prevailing party] problem differently than the Fourth Circuit."); Gillespie v. Brewer, 602 F.Supp. 218, 224 (N.D.W.Va. 1985) (noting difference between the Fourth Circuit Bonnes standard and the First Circuit Nadeau standard).[2]

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[2] This split in the circuits was also noted explicitly in a recent decision of the Fifth Circuit. See Hennigan v. Ouachita Parish School Board, 749 F.2d 1148, 1151 and n.15 (5th Cir. 1985) (citing Nadeau in the text as the standard "adopted by the majority of circuits" and contrasting it with the Bonnes standard cited in the footnote).

Maryland's petition in this case is supported by three other states in the Fourth Circuit (North Carolina, South Carolina, and West Virginia). See Brief of Amici Curiae in Support of Petition.[3] That is strong evidence that petitioners have not, as respondents claim, "made much ado over nothing." (Brief in Opp. at 6.)

In the district court, respondents' argument was just the reverse of their present argument. There, respondents argued (and, indeed, correctly so) that the Nadeau standard "is stricter than that required by the Fourth Circuit" and they sought comfort in the less strict Fourth Circuit standard. See Plaintiffs' Response to Defendants'

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[3] Amici join Maryland in seeking review of this case because the Fourth Circuit standard is at odds with the standard applied in the majority of circuits and because the Fourth Circuit standard is inconsistent with the intent of the Attorney's Fees Act. See Brief of Amici Curiae, passim.

Opposition to Motion for Award of Attorney's Fees at 17.[4]

In sum, there is no merit to respondents' claim of harmony and alignment between the Fourth Circuit and the majority of federal circuits on the "prevailing party" standard under the Attorney's Fees Act. As was the

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[4] In the district court, respondents distinguished the "stricter" Nadeau standard from that of Bonnes as follows:

> The court in Bush [v. Bays, 463 F.Supp. 59 (E.D.Va. 1978)], to deny fees, applied the standard articulated by the [court in] Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). In addition to the factors set forth in Bonnes, the First Circuit requires the plaintiff to establish that the defendant did not act gratuitously in changing its conduct. Id. at 281. This standard is stricter than that required by the Fourth Circuit. See Bonnes v. Long (sic), 455 U.S. 961, 966-67 (1982) (dissenting opinions to denial of cert. of Rehnquist, J. and O'Connor, J.)

Plaintiffs' Response to Defendants' Opposition to Motion for Award of Attorney's Fees at 17 (emphasis added).

case in Long v. Bonnes, the Fourth Circuit has again "rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . ." Sup. Ct. R. 17.1(a). Review by this Court to resolve this now long-standing conflict on an important question of federal law is warranted.

## CONCLUSION

For the reasons stated herein and in the petition, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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